No. 81719-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN WARREN HARRINGTON,

Petitioner.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether late-night, suspicionless confrontation of a pedestrian by multiple officers, including questioning the pedestrian about his activities and frisking him, all without informing the pedestrian of his right to refuse the contact and leave, constitutes a disturbance of the pedestrian's private affairs in violation of Article 1, Section 7.

STATEMENT OF THE CASE

Around 11 PM on the night of August 13, 2005, Dustin Harrington was walking peaceably along the sidewalk in Richland. Officer Reiber drove past and, without reasonable suspicion of wrongdoing, decided to initiate what he called a "social contact" with Harrington. He executed a

U-turn, passed Harrington and parked in a driveway in front of him. Reiber then approached Harrington and began questioning him about what he was doing, where he was going, and where he was coming from. Harrington was understandably nervous and fidgety, and Reiber asked him to take his hands out of his pockets ("for officer safety purposes"). Harrington complied, but then quickly put his hands in and took them out of his pockets several more times. Appellant's Opening Brief at 4-6.

Some time during this process a trooper drove past, and decided to stop as backup to Reiber. He also executed a U-turn, and parked close to the others by the side of the road. The record is unclear as to whether he activated his emergency lights, but the trooper said that he would normally do so under those circumstances. The trooper stood silently, in uniform, about 7 or 8 feet away from the two men. Appellant's Opening Brief at 5.

Reiber saw bulges in Harrington's pockets and asked Harrington if he could pat him down, but also told him he was not under arrest. At no time did the officer advise Harrington that he could refuse the "social contact" or pat down, or that he was free to leave. The subsequent pat down discovered a hard object, which Harrington admitted was a meth pipe, and Harrington was arrested. After Harrington's suppression motion was denied, he was convicted of possession of methamphetamine. A divided Court of Appeals upheld the stop and frisk and affirmed the

conviction. *See State v. Harrington*, 144 Wn. App. 558, 183 P.3d 352 (2008).

ARGUMENT

A. Article 1, Section 7 Broadly Prohibits Disturbances of Private Affairs, Rather than Narrowly Prohibiting Seizures

Both parties and the Court of Appeals focus their analysis on the question of whether Harrington was "seized." Such an approach is rooted in the text of the Fourth Amendment, which prohibits only "unreasonable searches and seizures," and the body of Fourth Amendment doctrine which interprets that phrase narrowly. This has led to very technical decisions, turning on facts viewed in isolation, as to whether either a search or seizure has occurred. *See, e.g., United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999) (holding that warrantless installation of a tracking device was neither a search nor seizure of a vehicle).

Amicus respectfully suggests that this analytical approach is inapposite for interpretation of the Washington Constitution. Article 1, Section 7 mentions neither "search" nor "seizure," but instead states, "No person shall be disturbed in his private affairs ... without authority of law." Both searches and seizures constitute disturbances, of course, so it is no surprise that the Article 1, Section 7 jurisprudence is rife with

references to both searches and seizures. There is no reason to believe, however, that searches and seizures are the only disturbances contemplated by the provision, especially not as they are narrowly interpreted under the Fourth Amendment. In fact, in practice this Court has looked broadly at whether there is a disturbance, even when it has used the term "search and seizure" as shorthand; it has done so without following the Fourth Amendment need to identify exactly what constituted either a "search" or "seizure." *See State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003) (holding that warrantless installation of a tracking device is a "search and seizure" under Article 1, Section 7).

Most significantly, evaluation of a disturbance under Article 1, Section 7 requires consideration of the full context of the incident, rather than looking at individual acts in isolation. *See, e.g., State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (holding a request for passenger identification is unconstitutional after "considering all the circumstances"). To the extent that individual acts are considered, each act increases the degree of intrusion, and the cumulative effect may cause a "disturbance," even though no act is a disturbance by itself. *Id.* at 700 ("once the interaction develops into an investigation, it runs afoul of our state constitution unless there is justification for the intrusion into the passenger's private affairs").

Under Article 1, Section 7, it is entirely unnecessary to determine *at what point* the line into unconstitutional disturbance was crossed; all that is necessary is to determine *whether* that line was crossed in the specific incident. *Jackson, supra,* demonstrates this approach; this Court considered not just the installation of the tracking device, but the type of information that could be gleaned from the device, the surreptitious nature or the tracking, and the potential for abuse.

Applying this evaluative framework shows that Harrington was disturbed in his private affairs—and this disturbance was admittedly without authority of law; there was no probable cause, or even reasonable suspicion, of criminal activity.

B. Harrington Was Not Engaged in a Social Encounter

The State portrays the incident as a mere "social encounter" between the officers and Harrington. Respondent's Brief at 6-10. The State incorrectly discusses each part of the incident in isolation—the initial encounter, activation of emergency lights, and the frisk—and finds each act to be acceptable. But the State fails to view the actions in combination, or discuss what the cumulative effect was on Harrington's private affairs.

In fact, to the extent that State discusses the surrounding circumstances of the encounter at all, it does so from the officer's

perspective, highlighting the concerns a reasonable officer might have had. Respondent's Brief at 11. That approach, however, is inappropriate to analysis under Article 1, Section 7:

> Unlike in the Fourth Amendment, the word "reasonable" does not appear in any form in the text of article I, section 7 of the Washington Constitution. ... In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7 we focus on expectations of the people being searched.

State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005). In other words, it is immaterial how a reasonable officer would view the context of the encounter; the only question is whether a person in Harrington's shoes would feel disturbed in his private affairs by the cumulative actions of the officers.

The State also is inconsistent in its characterization of the incident. On the one hand, it insists it was merely a social encounter. On the other hand, however, it characterizes much of the encounter as responses to fears for officer safety. The trooper decided to join the encounter "because there was only one officer," although it's unclear why that should matter for a social encounter. Respondent's Brief at 1. Officer Reiber asked Harrington to remove his hands from his pockets "for officer safety purposes." RP at 15. And finally, the request to frisk Harrington is

extensively described as necessary for officer safety. Respondent's Brief at 10-12.

These two views are fundamentally at odds. Only "where a conversation between an officer and citizen is freely and voluntarily conducted" can it qualify as a social encounter. *State v. Mennegar*, 114 Wn.2d 304, 313, 787 P.2d 1347 (1990), *overruled in part on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). In contrast, fears for officer safety are only reasonable if we assume the other person is potentially hostile, rather than a willing participant. Since a social encounter is entirely voluntary on both sides, the rational response for an officer who fears for his safety is simply to break off the encounter.

This is especially true when viewing the frisk. It must be remembered that the officers here had neither probable cause nor reasonable suspicion of criminal activity, and therefore no authority of law to detain Harrington or otherwise disturb him in his private affairs. Frisking Harrington under these circumstances cannot be justified by concerns for officer safety. Indeed, the only cases the State cites involve frisks after valid *Terry* stops, and thus are inapplicable to the present situation. *See State v. Collins*, 121 Wn.2d 168, 847 P.2d 919 (1993); *State v. Laskowski*, 88 Wn. App. 858, 950 P.2d 950 (1997).

Relying on *City of Seattle v. Hall*, 60 Wn. App. 645, 806 P.2d 1246 (1991), the Court of Appeals nonetheless held the frisk was legitimate, despite the lack of justification for a *Terry* stop. *See Harrington*, 144 Wn. App. at 563. This reliance is misplaced, since *Hall* did not concern itself with an encounter initiated by officers. The actual holding states, "When an individual *voluntarily approaches an officer* and behaves in a manner that causes the officer a legitimate concern for his or her safety, that officer is entitled to take immediate protective measures." *Hall*, 60 Wn. App. at 651 (emphasis added). In fact, the opinion seems more a validation of an officer's common law right of self-defense than anything else. To read *Hall* beyond its facts would allow officers to approach and frisk anybody who is "antsy, hostile, and nervous," *id.*, without any suspicion of criminal activity or other authority of law. Such a reading would eviscerate the protections guaranteed by Article 1, Section 7.

In finding the entire encounter to be consensual, the Court of Appeals also placed great emphasis on the fact that Officer Reiber "*asked* if Harrington would talk with him," "request[ed]" that Harrington remove his hands from his pockets, and "asked if he could check Mr. Harrington's pockets." *Harrington*, 144 Wn. App. at 560-61. This approach elevates form over substance; a person's constitutional rights should not depend on

whether an officer is courteous or phrases a demand in the form of an interrogative rather than an imperative. When a train conductor asks, "May I see your ticket, please?" a reasonable rail passenger recognizes that for a demand, not a social question that may be ignored. By the same token, when a traffic officer stops a car and asks, "May I see your license and registration, please?" no reasonable driver will consider refusal to be an option.

Under the circumstances Harrington faced on the night of August 13—walking alone at night; being approached by first one, and then two uniformed and armed officers; possibly seeing emergency lights activated on one patrol car; being "asked" about his activities; being "asked" to move his hands "for safety reasons"; and being "asked" to be patted down—a reasonable person would believe that the "requests" were demands, and that he had no choice but to comply. Indeed, it is hard to imagine that Harrington would have complied with the requests *unless* he thought he had no choice. A reasonable person accosted by two strangers at night—even when one of them stands "a respectful distance away," *id.* at 561—is likely to feel either annoyed or threatened, and respectively ignore their demands or comply only out of fear. It is most unlikely that the person will see the encounter as a pleasant "social" visit, and both

freely engage in conversation and voluntarily comply with unusual requests involving intrusion into his personal space.

Judge Sweeney accurately summed up the situation:

> In short, there was no legally supportable reason for this encounter/stop/confrontation/seizure and labeling it a "social contact" does not change the reality. There simply was no reason to contact Mr. Harrington. We do a disservice to the public and to police by moving the so-called "social contact" into just another form of seizure, albeit without any cause or suspicion of crime or danger to the public or the police. Backup is certainly an important police safety procedure for any investigation. But this was, according to the court, not an investigation, it was a "social contact." ... The court's conclusion that Mr. Harrington's conduct was "suspicious, and supported Officer [Scott] Reiber continuing the contact" flies in the face of the court's conclusion that all of this amounted to a "social contact." ... A social contact should be just that—a social contact—not an opportunity for police to investigate, provoke, or "find" criminal activity. This may have started as a casual encounter but it escalated into something more, without probable cause or even a reasonable suspicion that Mr. Harrington had done anything wrong.

Id. at 564 (Sweeney, J., dissenting) (citations omitted). *Amicus* respectfully suggests that Judge Sweeney's characterization of the incident as "something more" would be better stated as "a disturbance of Harrington's private affairs."

C. Consent to a Voluntary "Social Encounter" Requires the Individual to Know He Has the Right to Refuse the Encounter

The keystone for whether an encounter between an officer and an individual is allowed without authority of law is whether that encounter is "voluntary and consensual." *Mennegar*, 114 Wn.2d at 314. In order for consent to be meaningful, however, an individual must know whether or not he has the right to refuse; absent that knowledge, apparent consent is just as likely to be resignation to a perceived show of authority, rather than a voluntary choice.

Determining rights in these situations can be tricky:

> Lawyers and judges will debate and disagree whether a seizure was effected under circumstances such as occurred in this case. It is unrealistic to expect citizens to make informed and intelligent decisions concerning the lawful authority of a police officer to issue directives like the one involved here. We should not encourage persons in the position of the defendant to choose not to comply and thereby possibly create risks for those involved as well as for the general public.

State v. Nettles, 70 Wn. App. 706, 714, 855 P.2d 699 (1993) (Baker, J., dissenting). Judge Baker further described the dangers in leaving those difficult determinations up to average citizens:

> Worse, it promotes dubious policy. Had [the defendant] elected another course of action—for example, turning and running—the situation could have escalated into a chase through a residential neighborhood, with obvious attendant risks to innocent bystanders. We should encourage compliance with officer requests, including those borne of concern for officer safety. This is best accomplished not by

> straining to validate police stops which are effected on insufficient grounds, but by refusing to penalize those who do comply with the police officer's directions.

Id. If this Court's answer to Harrington is that he should simply have refused Officer Reiber's requests here, does that not encourage future suspects for whom there is, in fact, reasonable suspicion of criminal activity to likewise refuse cooperation under the mistaken belief that acquiescence is not required? Such actions will only lead to greater risks of violence between law enforcement and individuals, benefitting neither them nor the community.

Ultimately, the only way to ensure that an individual knows his rights in an encounter such as faced by Harrington is for the officer to clearly inform the individual of his right to refuse consent and to leave. Without such a simple statement, many individuals will be confused, and that confusion may be misinterpreted by some officers as "free and voluntary" participation in an encounter. Telling an individual that he is not under arrest is not sufficient, since that doesn't explain what the person's actual rights are; for example, if there is reasonable suspicion of criminal activity, the individual may still not be allowed to leave, although he is not under arrest. Some law enforcement officers are skilled in exploiting citizens' lack of sophistication about their rights, and are even

trained to do so. But consent obtained from a confused individual is not true consent.

Equally significantly, that confusion may lead a court to decide that an encounter was coerced, when in fact the individual chose to consent. A bright line rule requiring officers to inform individuals of their right to refuse consent therefore helps both individuals and officers, eliminating the possibility of confusion and misinterpretation. Once having provided such information, an officer can be confident that continued cooperation is voluntary, and that any information gained through the encounter will not be later suppressed by a court.

This is far from a radical concept, and similar steps to ensure voluntary consent have been required for decades. Most famous, of course, is the requirement of a recitation of rights prior to custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). More closely analogous to the present situation is the requirement under Article 1, Section 7 that residents be informed of their right to refuse entry as part of a "knock and talk." *See State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). Washington courts have also hinted at similar requirements in other situations. *See State v. Richardson*, 64 Wn. App. 693, 697 n. 1, 825 P.2d 754 (1992) (officer's failure to inform defendant he was free to leave contributed to unconstitutionality of

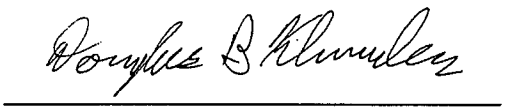
encounter); *Morse*, 156 Wn.2d at 13 ("police are required to tell the person from whom they are seeking consent that they may refuse to consent"). *Amicus* urges this Court to make those hints explicit, and require officers to inform individuals that they are free to refuse consent to social encounters, and free to leave.

The purpose of requiring a simple informative statement is, of course, *not* to eliminate the myriad voluntary encounters between law enforcement and Washingtonians that occur every day. Such encounters are a vital part of the policing function, building ties and cooperation between law enforcement and the community, and assisting in both the prevention and detection of wrongdoing. The adoption of an informational requirement will *bolster* the usefulness of such encounters. It will ensure that such encounters are truly voluntary, will dispel community suspicions that law enforcement is more interested in tripping people up than protecting them, and increase cooperation between officers and the community.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to reverse the Court of Appeals, and hold that Harrington was unconstitutionally disturbed in his private affairs.

Respectfully submitted this 17th day of August 2009.

By 

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